Supreme Court, U.S.
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No. 00-163

IN THE

Supreme Court of the United States

CHERI TROY,

Petitioner,

v.

PIERCE COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WASHINGTON STATE SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The question presented for review by the Petition is whether the local government's wetland management regulations which require preservation of wetland areas are an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution and whether such wetland regulations entitle Petitioner to compensation. Pet. at *i* and 3. Petitioner mistakenly argues that the Pierce County Wetland Management Regulations (WMR) require a property owner to convey or dedicate wetland areas to the county or the public, and that she is entitled to compensation for such conveyance/dedication. Pet. at i, 4, 6, 10, 12, 13, 17, and 19.

Petitioner further argues that these wetland regulations violate the Contracts Clause of Article I § 10 of the U.S. Constitution. Pet. at *i* and 18.

The local regulations at issue do not amount to a "regulatory taking" in violation of the Fifth and Fourteenth Amendments to the United States Constitution, nor are such regulations a state law in violation of Article I § 10 of the U.S. Constitution. The regulations require only that the wetland areas on property proposed to be developed be identified and protected. The Washington State Court of Appeals' decision was proper, and Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

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CASE HISTORY

In 1991, Petitioner Cheri Troy purchased a five-acre parcel of undeveloped property in unincorporated Pierce County, intending to construct a single-family dwelling.[1] The following year Pierce County enacted Wetland Management Regulations (WMR)[2] for the protection of environmentally critical wetland areas.

Because of the presence of wetlands on her property Petitioner was required to categorize and delineate the location of the wetlands before she could obtain a building permit. During the wetland process Petitioner was informed that the location of her single-family dwelling encroached upon the wetland buffer. Accordingly, Petitioner was directed to either relocate the structure or propose mitigation to compensate for the encroachment into the wetland buffer.[3]

Petitioner revised her site plan so that her proposed dwelling was located outside the wetland buffer, and the County agreed to issue wetland approval. In accordance with the WMR,

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1. The facts in this case history are as reported in the Washington State Court of Appeals October 1, 1999, decision, Appendix A1 to Petition for Writ of Certiorari.

2. The WMR in their current form are codified at 18E of the Pierce County Code.

3. If Petitioner's property had been significantly covered by wetlands, Petitioner could have applied for a "reasonable use exception," which is similar to a variance. See App. A, section 17.12.120(E) of the Pierce County Code, now codified as amended PCC 18E.30.100.

Petitioner had to mark the edge of the wetland buffer with permanent markers placed every 30 feet and record a Wetland and/or Buffer Notice[4] on the title to the land.

At this point Petitioner asserted that the County was "taking" her property without compensation. Petitioner seemed particularly concerned about a provision in the WMR that appeared to her to transfer property rights from her to the County:

> Prior to final approval of any wetland application, the part of the wetland and/or buffer which is on the site shall be placed in a separate wetland tract or tracts, protective easement, public or private land trust dedication, or similarly preserved through an appropriate protective mechanism as determined by Pierce County. All wetland tracts, protective easements, land trust dedications and other similarly preserved areas shall remain undeveloped in perpetuity, except as they many be allowed to be altered pursuant to this Chapter.[5]

Ultimately, Petitioner applied for a wetland variance as a way to challenge the WMR. The variance was denied by

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4. The substance of the Notice states:

> This property contains wetlands or wetland buffers as defined by Pierce County Code 17.12. Restrictions on use or alteration of the wetlands or wetland buffers may exist due to natural conditions of the property and resulting regulations.

5. *See* Pierce County Code 17.12.140(E), Appendix A, now codified as amended PCC 18E.30.080.

the County hearing examiner and Petitioner appealed the denial to Superior Court. In addition to the appeal of the denial of the variance, Petitioner alleged that the County had inversely condemned her property, that the County's actions constituted arbitrary and capricious conduct entitling her to damages under state law and federal law, and the County violated the Contracts Clause of the Washington and U.S. Constitutions.

The Superior Court dismissed her case and Petitioner appealed to the Washington State Court of Appeals. In an unpublished decision issued October 1, 1999, the Court of Appeals affirmed the dismissal of Petitioner's case. After the Washington State Supreme Court denied her petition for review, Petitioner sought review by the United States Supreme Court.

The gravamen of Petitioner's case seems to be her mistaken belief that the County WMR require her to dedicate, deed, transfer or convey property rights to the County. A review of the WMR establishes that once the presence of wetlands have been located on a property proposed to be developed, the WMR require that such wetlands be preserved and protected. Title to the wetlands remains in the ownership of the property owner. No dedication to the public occurs.

REASONS FOR DENYING THE WRIT

A. THIS CASE IS NOT RIPE FOR REVIEW.

The Supreme Court has frequently held that a matter is not ripe for review when a petitioner "has not yet obtained a final decision regarding how [he/she] will be allowed to develop [his/her] property. *Lucas v. South Carolina Coastal*

Council, 505 U.S. 1003, 1011, 112 S. Ct. 2886, 2891, 120 L. Ed. 2d 798 (1992); quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190, 105 S. Ct. 3108, 3118, 87 L. Ed. 2d 126 (1985). "Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 106 S. Ct. 2561, 2567, 91 L. Ed. 2d 285 (1986).

The final site plan submitted by Petitioner on July 21, 1994, was approved on August 22, 1994. App. A3 to Petition for Writ of Certiorari. Such site plan showed that Petitioner's single-family dwelling would not be located within the wetland or wetland buffers. *Id.* All that remained was for Petitioner to record the notice regarding the presence of wetlands and identify the wetland areas with markers. *Id.* Petitioner failed to do both, but instead wrote letters to and ultimately brought suit against the County. The variance sought by Petitioner was in actuality an attempt to get the County hearing examiner to rule that the County WMR were unconstitutional because she incorrectly believes that the WMR required her to deed property to the County. *Id.* at A6-7.

Petitioner nevertheless argues, as she has done previously, that she wanted to conduct farming activities on her property and that she is concerned regarding the impact the WMR would have on the "farm-ability" of her property. See Pet. at 6. Respondent is unaware of any applications Petitioner filed with the County with respect to farming activities on the property; therefore, if Petitioner is challenging the WMR as they pertain to farming activities,

she has failed to request approval from the County for any such activities. In the absence of such request, this case is not yet ripe for review.

B. THE COURT OF APPEALS' DECISION COMPORTS WITH ESTABLISHED "TAKINGS" JURISPRUDENCE.

Petitioner mistakenly begins by arguing that because the WMR require that wetlands be staked and protected, a "taking of title" or "physical invasion" has somehow occurred . Pet. at 15. While Petitioner appears to concede that the Supreme Court has recognized that in order to prevail on a takings claim, a landowner must prove that (1) the challenged regulations compel the landowner to suffer a physical "invasion" of his/her property, or (2) that the landowner has been denied all economically viable use of the property as a result of the challenged ordinance,[6] Petitioner fails to explain how the identification and preservation requirements of the WMR amount to either a physical invasion of the property or deprivation of all economically viable use of the property.

The Court of Appeals decision properly recognized that to succeed in a takings challenge, Petitioner must show a total taking of the property's value or a physical invasion of the landowner's property. See App. A12 to Petition for Writ of Certiorari, fn. 11. The Court of Appeals concluded, however, that because Petitioner had never placed identification markers on the wetlands there was no physical invasion of her property. *Id.* Similarly, the Court of Appeals

6. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798 (1992); Pet. at 15-16.

correctly concluded that because Petitioner had conceded that her property retains some economic value there was no regulatory taking of her property. *Id.*

In the absence of either a physical invasion of the property or a regulation which denies a property owner all economically viable use of his/her property, there is no violation of the Takings Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution.

Similarly, Petitioner's reliance on the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) is misplaced in that the Supreme Court has not extended *Dolan's* rough proportionality test beyond the context of "exactions" or land use decisions conditioning approval of development proposals on the dedication of property to public use. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703, 119 S. Ct. 1624, 1635, 143 L. Ed. 2d 882 (1999). Because there has been no dedication or exaction, the rough proportionality test is not relevant.

C. THE WETLAND MANAGEMENT REGULATIONS DO NOT VIOLATE THE CONTRACTS CLAUSE OF U.S. CONSTITUTION, ARTICLE I § 10.

Petitioner argues that the County WMR are a violation of U.S. Constitution, Art. 1 § 10, which provides that "[n]o State shall . . . pass any . . Law impairing the Obligation of Contracts." Pet. at *i* and 18.

A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. *Ogden v. Saunders*, 12 Wheat. 213, 316, 317, 6 L. Ed. 606 (1827). Changes in

the laws that make a contract legally enforceable may trigger Contracts Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter the contracts' bargained-for terms. *See General Motors Corp. v. Romein*, 503 U.S. 181, 182, 112 S. Ct. 1105, 1107, 117 L. Ed. 2d 328 (1992).

In the present case the only contract mentioned is a real estate purchase and sale agreement wherein Petitioner claims to have purchased the property in 1991. Pet. at 4. The County is not a party to Petitioner's real estate contract, nor was any evidence presented to suggest that the WMR prevent or prohibit the Petitioner's ability to comply with the terms and conditions of the contract. The parties to such real estate contract still have the same ability to enforce the bargained-for terms that they did before the WMR were enacted in 1992.

An argument similar to the one made by Petitioner in this case was summarily dismissed in *Saxe v. Breier*, 396 F. Supp. 407 (E.D. Wis. 1975), wherein the plaintiff argued that a local ordinance which regulated massage parlors violates the constitutional proscription against state law impairment of contracts contained in Article I § 10 of the U.S. Constitution. Plaintiff claimed that the ordinance impaired her contract embodied in her leasing agreement and the "contract" arising from the plaintiff's compliance with the local building code. The Court found plaintiff's claim "to be clearly without merit." So too Petitioner's claims in this regard are without merit.

CONCLUSION

This is not a case where the government has required that a landowner dedicate all or a portion of his/her land to the government in exchange for approval of a development proposal. Nor is it a situation where the government regulations prevent or prohibit all development on a parcel of property.

This is simply a case where the local government has imposed wetland regulations designed to preserve and protect environmentally critical wetlands. Under the regulations at issue, a land owner has the ability to develop the property outside the wetlands and associated wetland buffers, or develop within the wetland areas and provide mitigation for the destruction of such wetlands.

In this case Petitioner submitted a revised site plan wherein she elected to develop outside the boundary of the wetlands and wetland buffers on her property. Her site plan was then approved. All that remained to be done was for Petitioner to permanently flag the wetlands and to record a notice indicating that wetlands are present on the property.

Contrary to Petitioner's understanding and belief, the County's actions do not amount to a dedication of her property. Nor do the County's actions amount to a "physical invasion" of her property. Her property remains valuable and she could have constructed her house on it, had she not elected to sell the property.

While her decisions on how to proceed may have been imprudent and may have reflected her misunderstanding of the regulations and the law, no constitutional violation has occurred.

For the reasons set forth above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM THE WETLAND MANAGEMENT REGULATIONS, PIERCE COUNTY CODE

17.12.120 One-family Dwellings Procedures and Reasonable Use Exception.

An applicant may use the following procedure for construction of a one-family dwelling and regulated activities accessory to a one-family dwelling:

A. Where the Department determines that a regulated wetland may be present within 150 feet of the proposed activity, the applicant shall select one of the following options:

1. The applicant shall provide the Department with a report prepared by a wetland specialist which recommends the appropriate wetland category and includes rationale for the recommendation. The Department will review and approve the wetland category and buffer as follow:

Wetland Category	Buffer
I	150 feet
II	100 feet
III	50 feet
IV	25 feet

2. Alternatively, the Department, upon request, shall determine the appropriate wetland category. The buffer width shall be according to the table in 17.12.120.

Appendix

B. The Department will determine whether the activity would intrude into the buffer, the wetland, or both.

   1. If the Department determines that the proposed activity may intrude into the wetland and/or buffer, the applicant shall prepare a delineation report subject to approval by the Department; or

   2. If the Department determines that the proposed activity may intrude only into the buffer, the Department, upon request, shall delineate the wetland.

C. Following approval of the delineation report or the Department's completion of the delineation, the applicant shall place permanent clearly visible markers on-site at the edge of the buffer. Placement of markers by a licensed surveyor is not required. No regulated activities shall occur within the wetland and/or buffer except as allowed in 17.12.120 Subsection D. Temporary intrusion into the buffer necessary for construction activities may be allowed if the buffer can be adequately restored.

D. Construction of a one-family dwelling and regulated activities accessory to a one-family dwelling shall be allowed:

   1. In the buffer if the applicant demonstrates to the Department that all adverse impacts to wetlands will be mitigated.

   2. In the wetland, after Department approval of the following reports. The reports shall be prepared by a wetland specialist obtained by the applicant.

a. A report which recommends the appropriate wetland category and includes rationale for the recommendation, unless the category has already been determined by the Department; and

b. A wetland delineation report, unless a delineation has already been approved by the Department; and

c. A mitigation plan. The mitigation plan shall provide that all adverse impacts to the wetland will be mitigated.

E. Reasonable Use Exception: If strict application of this Section would not allow use of the property for a one-family dwelling, the Hearing Examiner may approve use of the property for a one-family dwelling. Following a public hearing, approval shall be granted if the following conditions are met:

1. The proposed activity will have only minor impacts to the wetland; and

2. The proposed activity will not jeopardize the continued existence of species listed by the federal government or the state as endangered, threatened, sensitive, or documented priority species or priority habitats; and

3. The proposed activity will not cause significant degradation of groundwater or surface water quality; and

4. All adverse impacts to the wetland will be mitigated to the greatest extent possible; and

5. There will be no damage to public or private property and no threat to the health or safety of people caused by the proposed activity; and

6. The inability to use the property for a one-family dwelling is not the result of segregating or dividing the property after the effective date of this Chapter.

* * *

17.12.140 Wetland Application Procedure and Fees.

A. The Department shall, to the extent reasonable, consolidate the processing of related aspects of other Pierce County regulatory programs which affect activities in wetlands, such as subdivision, site development, floodplain and environmentally sensitive areas, with the wetland approval process established herein so as to provide a timely and coordinated review process.

* * *

D. Notice on Title: When Pierce County determines that activities not exempt from this Chapter are proposed, the property owner shall file for record with the Pierce County Auditor a notice approved by the Department in a form substantially as set forth below. The notice shall provide notice in the public record of the presence of a wetland or buffer, the application of this Chapter to the

property, and that limitations on actions in or affecting such wetlands and buffers may exist. The notice shall be notarized and shall be recorded prior to approval of any land use proposal for the site.

Notice on title is not required for utility line easements on lands not owned by the jurisdiction conducting the regulated activity.

Form of notice:

WETLAND AND/OR WETLAND BUFFER NOTICE

Tax Parcel Number:

Address:

Legal Description:

_____

_____

_____

_____

Present Owner:

_____

NOTICE: This property contains wetlands or wetland buffers as defined by Pierce County Code 17.12. Restrictions on use or alteration of the wetlands or wetland buffers may exist due to natural conditions of the property and resulting regulations.

Date _____ Signature of owner _____

Notary acknowledgment and notary seal _____

E. Wetland Tract

1. Prior to final approval of any wetland application, the part of the wetland and/or buffer which is on the site shall be placed in a separate wetland tract or tracts, protective easement, public or private land trust dedication, or similarly preserved through an appropriate permanent protective mechanism as determined by Pierce County. All wetland tracts, protective easements, land trust dedications and other similarly preserved areas shall remain undeveloped in perpetuity, except as they may be allowed to be altered pursuant to this Chapter.

2. Prior to final approval of any wetland application, the common boundary between a wetland tract, protective easement, land trust dedication, or other similarly preserved area and the adjacent land shall be permanently identified with permanent signs. Sign locations, wording, and size and design specifications shall be as required by the Department.

3. At any time after a wetland tract, protective easement, land trust dedication, or other similarly preserved area has been established, the owner may submit a

delineation report to the Department. If the Department determines that a boundary change has occurred, or that a wetland no longer exits, the wetland tract, protective easement, land trust dedication, or other similarly preserved area may be altered or eliminated, as appropriate. If the Department determines that wetland boundaries have changed or that a wetland has been eliminated due wholly or in part to illegal activity, a change or elimination of wetland tract, protective easement, land trust dedication, or other similarly preserved area shall not be permitted.

4. A wetland tract, protective easement, land trust dedication, or other similarly preserved area is not required for utility lines in easement on lands not owned by the jurisdiction conducting the regulated activity.

F. Review and Approval: A Wetland Application shall be reviewed by the Department. Approval shall be granted upon a determination that the wetland analysis report and mitigation plan meet all applicable requirements of this Chapter, and that the monitoring program and contingency plan are tied to an acceptable financial guarantee to assure that the requirements will be complied with.

G. Expiration: Approvals shall be valid for a period of three years from the date of issue unless a longer or shorter period is specified by the Department. An extension of an original approval may be granted upon submittal of a written request to the Department prior to expiration.

Appendix

Prior to the granting of an extension, the Department may require updated studies if, in its judgment, the original intent of the approval is altered or enlarged by the renewal, if the circumstances relevant to the review and issuance of the original permit have changed substantially, or if the applicant failed to abide by the terms of the original approval.

* * * *